Supreme Court, U.S.
FILED
MAY 19 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1364

In the Supreme Court of the United States

OCTOBER TERM, 1987

RAMON MILIAN-RODRIGUEZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court properly denied petitioner's motion to suppress evidence on the ground that the motion was not made within the time set by the court for filing pretrial motions.

2. Whether the admission of evidence from a warrantless search of petitioner's airplane, based on probable cause and exigent circumstances, was plain error.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-20) is reported at 828 F.2d 679.

JURISDICTION

The judgment of the court of appeals was entered on September 28, 1987. A petition for rehearing was denied on November 19, 1987. On January 21, 1988, Justice Stevens extended the time for filing a petition for a writ of certiorari to January 28, 1988, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted on one count of participating in an enterprise

through a pattern of racketeering activity, in violation of 18 U.S.C. 1962(c); 47 counts of foreign travel in aid of a racketeering enterprise, in violation of 18 U.S.C. 1952; 10 counts of failing to file Currency Transaction Reports, in violation of 31 U.S.C. 5313 and 5322(b); and two counts of failing to file Currency and Monetary Instrument Reports, in violation of 31 U.S.C. 5316 and 5322(b). By stipulation of the parties and with the district court's consent, one count of possession of cocaine with intent to distribute it was submitted to the trial judge for adjudication based on the record at trial after the jury was unable to reach a verdict; the court found petitioner guilty on that count. Petitioner was sentenced to a total of 35 years' imprisonment and fined a total of $6,495,000. The court of appeals affirmed (Pet. App. 1-20).

1. The evidence at trial is summarized in the opinion of the court of appeals (Pet. App. 3-7). It showed that petitioner was a Florida-based certified public accountant who served as the registered agent of Cambios Monetarios Internacional, S.A. (Cambios), a Panamanian company engaged in currency trading, exchange, and investment. In November 1982, federal agents in Miami received information from law enforcement authorities in Panama that petitioner was traveling frequently to Panama with extremely large sums of United States currency. Upon checking government records, the agents found that neither Cambios nor petitioner had filed Currency Transaction Reports (CTRs) or Currency and Monetary Instrument Reports (CMIRs) for the currency, as required by federal law. Accordingly, the government began an investigation of petitioner and placed him under surveillance. Pet. App. 4.

In April 1983, federal agents twice observed petitioner depart for Panama aboard his heavily loaded Lear jet. They subsequently learned from Panamanian officials

that the cargo consisted of large quantities of United States currency, for which none of the requisite disclosure forms had been filed. On the morning of May 4, 1983, the agents saw petitioner's plane being loaded in precisely the same manner as on the two previous occasions. After petitioner arrived at the airport and boarded the plane, the airport control tower received the Lear jet's flight plan, which indicated that the plane would be traveling non-stop to Panama. Petitioner had not filed a CMIR in connection with that flight. Pet. App. 5.

When petitioner's jet proceeded to the runway for takeoff, federal agents stopped and searched the plane, which was loaded with almost $5.5 million in United States currency. The agents also found petitioner's attaché case in the cabin, which contained detailed records of petitioner's money-laundering activities and documented petitioner's transportation to Panama between August 1982 and April 1983 of approximately $146 million. Pet. App. 5.

While the search was taking place, the agents took petitioner to an office in the terminal. The agents told petitioner that he was not under arrest. Nonetheless, petitioner offered to cooperate fully with the investigation and become a government informant. After being advised of his rights, petitioner stated that he laundered money for a number of major narcotics dealers. Pet. App. 5-6.

Petitioner signed a written consent form, authorizing federal agents to search his business office in Coconut Grove, Florida (Pet. App. 6). During that search, agents encountered a locked closet in petitioner's office. Petitioner had told the agents that the key to the closet was in the attaché case that the agents had already seized from the Lear jet, but the agents decided to pick the lock instead of retrieving the key. The closet contained a number of firearms, including an Uzi semiautomatic assault rifle, and

approximately 62 pounds of high-quality cocaine. After discovering those items, the agents went to petitioner's home and placed him under arrest. When he was told about the cocaine, petitioner stated that he had forgotten that the office closet contained illicit drugs. Petitioner then consented to a search of his home, in which the agents found additional firearms and a substantial amount of counterfeit currency. Pet. App. 6-7.

2. Prior to trial, petitioner moved to suppress all the evidence gathered after the initial stop of his airplane. The district court upheld against a Fourth Amendment challenge the stop and search of petitioner's airplane as well as the consensual search of petitioner's office. The court, however, suppressed the guns and narcotics found in the locked office closet on the ground that the search of the locked closet was beyond the scope of petitioner's consent. The court also suppressed the evidence seized from petitioner's home after his arrest, finding that the agents should have obtained a warrant before conducting that search. Pet. App. 7. The government took an interlocutory appeal from the district court's suppression order, and the court of appeals reversed. 759 F.2d 1558, cert. denied, 474 U.S. 845 (1985). The court held that petitioner had consented to the search of his office closet; that his subsequent warrantless arrest was justified by exigent circumstances, including the possibility that he might flee or destroy or remove evidence; and that he consented to the post-arrest search of his home (759 F.2d at 1562-1565).

On remand, just prior to trial, petitioner renewed his motion to suppress the evidence obtained from the search of his airplane. This time, however, he contended that the evidence was seized not in violation of the Fourth Amendment but in violation of 31 U.S.C. 5317(a).[1] Petitioner

[1] Section 5317(a) provides:

> The Secretary of the Treasury may apply to a court of competent jurisdiction for a search warrant when the Secretary

relied on *United States* v. *Chemaly*, 741 F.2d 1346 (1984), vacated, 741 F.2d 1361, reinstated, 764 F.2d 747 (1985) (en banc), in which the Eleventh Circuit held that the predecessor to Section 5317(a) imposed a statutory warrant requirement on border searches by law enforcement officers seeking evidence of federal currency violations (741 F.2d at 1350). The district court denied the motion as untimely, noting that it had been filed 49 days after the court's filing deadline. The district court further held that, in any event, the motion was without merit. The court stated that the instant case was distinguishable from *Chemaly* because the agents in this case had probable cause to search petitioner's airplane and because their failure to obtain a warrant was excused by exigent circumstances (Pet. App. 10-11 & n.3).

3. The court of appeals affirmed, concluding that the district court "did not abuse its discretion in finding that [petitioner's] presentation of the *Chemaly* argument was untimely and that the delay was inexcusable" (Pet. App. 12). The court noted that "[petitioner's] motion was filed within a few days of [his] trial, forty-nine days after the district court's filing deadline, nearly fourteen months after the *Chemaly* decision, and more than five months after the en banc court denied rehearing en banc in that case" (*ibid.*). Petitioner's only excuse for the delay in making the motion was that his counsel did not learn of

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reasonably believes a monetary instrument is being transported and a report on the instrument under section 5316 of this title has not been filed or contains a material omission or misstatement. The Secretary shall include a statement of information in support of the warrant. On a showing of probable cause, the court may issue a search warrant for a designated person or a designated or described place or physical object. This subsection does not affect the authority of the Secretary under another law.

the *Chemaly* decision until shortly before he made the renewed motion to suppress. The court of appeals stated that "[t]his excuse will not, and cannot, suffice in any orderly system of decision-making" (Pet. App. 13). The court accordingly concluded that the motion was properly denied for "inexcusable delay and last-minute motion filing" (*ibid.*).

The court of appeals also rejected petitioner's contention that the district court's failure to suppress the evidence in light of *Chemaly* constituted plain error (Pet. App. 14). The government argued to the court of appeals that "*Chemaly* dealt solely with the border search exception to the fourth amendment warrant requirement, [741 F.2d] at 1351, and did not address the exceptions for exigent circumstances and for vehicle searches, both of which arguably apply in this case" (Pet. App. 14 (emphasis omitted)). The court of appeals did "not intimate a conclusion on the merits of the Government's attempt to distinguish *Chemaly*," but instead simply held (*ibid.*) that "the district court's refusal to apply *Chemaly* to the facts of this case does not constitute plain error."

ARGUMENT

1. Petitioner first contends (Pet. 8-14) that the district court abused its discretion in denying petitioner's suppression motion on the ground that it was untimely. Rule 12(b)(3) of the Federal Rules of Criminal Procedure requires motions to suppress evidence to be made prior to trial. Rule 12(c) explicitly authorizes the court to "set a time for the making of pretrial motions or requests." Rule 12(f), in turn, provides that "[f]ailure by a party to raise defenses or objections or to make requests which must be made prior to trial, at the time set by the court pursuant to subdivision (c), * * * shall constitute waiver thereof." Failure to file a suppression motion within the date set by a trial judge, in the absence of an adequate excuse for the

delay, is therefore a sufficient ground for denying that motion. See, *e.g.*, *United States* v. *Worthington*, 698 F.2d 820, 824 (6th Cir. 1983); *United States* v. *Mangieri*, 694 F.2d 1270, 1282-1284 (D.C. Cir. 1982); *United States* v. *Hirschhorn*, 649 F.2d 360, 364 (5th Cir. 1981).

In this case, the trial judge held a status conference on August 16, 1985, at which he ordered the parties to file all pretrial motions on or before September 25, 1985 (Pet. App. 12). The order explicitly stated that "[a]ny motion filed after that date will be denied as untimely" (*ibid.*). Nevertheless, petitioner did not make his suppression motion based on the *Chemaly* case until November 13, 1985—49 days after the district court's filing deadline, nearly 14 months after the initial decision in *Chemaly*, more than five months after the en banc court reinstated the panel decision in that case, and only a few days before trial. As the court of appeals concluded (Pet. App. 12-13), "[t]hese facts demonstrate inexcusable delay and last-minute motion filing."

Although a district court "for cause shown may grant relief from the waiver" (Fed. R. Crim. P. 12(f)), petitioner did not show cause for his failure to make the motion in a timely fashion. At oral argument before the court of appeals, counsel for petitioner defended the delay solely on the ground that he did not learn of the *Chemaly* case "until a few weeks or a week or so before I actually went ahead and made that motion" (Pet. App. 13). The court of appeals correctly concluded (*ibid.*) that "[t]his excuse will not, and cannot, suffice in any orderly system of decision-making." See *United States* v. *Mangieri*, 694 F.2d at 1283 (counsel must exercise "due diligence" in uncovering grounds for motion).[2]

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[2] Petitioner's reliance on *Jones* v. *United States*, 362 U.S. 257 (1960), is misplaced. In *Jones* this Court stated that the rule requiring

Petitioner argues (Pet. 10) that the motion in question merely "supplement[ed]" the suppression motion he filed in late 1983, before the government's interlocutory appeal, and that it rested on the same ground as the earlier motion—"that the government agents needed a warrant to search the airplane." In fact, however, the legal basis for the later motion was completely different from that of the earlier motion. Petitioner's earlier motion argued that the search of the airplane violated the Fourth Amendment. His later motion argued that the search violated Section 5317(a). It is this separate statutory argument that the district court properly rejected as untimely, not petitioner's earlier constitutional argument. See *United States* v. *Worthington*, 698 F.2d at 824 ("this third motion to suppress was not a renewal of one of the earlier motions, but rather was a new motion setting out a new reason why the evidence should be suppressed").

2. Petitioner further contends (Pet. 14-15) that, even if his suppression motion was properly denied as untimely, the admission at trial of the evidence seized from the airplane was plain error. It is well settled, however, that a claim waived in the district court under Rule 12(f) is not subject to review even for plain error. See, *e.g.*, *United*

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that a motion to suppress be made before trial is not a "rigid one" (*id.* at 264). At that time Rule 41(e) provided that "the court in its discretion may entertain the motion [to suppress] at the trial or hearing" (Fed. R. Crim. P. 41(e) (1960 ed.)), and the Court explicitly relied on that language. Rule 41, however, no longer contains that language; instead, it provides that the time for filing a motion to suppress is governed by Rule 12. See Fed. R. Crim. P. 41(f). Rule 12 provides that the failure to file a suppression motion before trial and within the time set by the district court constitutes a waiver. District courts may, of course, grant relief from the waiver "for cause shown." As both the district court and the court of appeals concluded, however, petitioner failed to show adequate cause for his failure to make a timely filing.

States v. *Mangieri*, 694 F.2d at 1284 n.15; *United States* v. *Garcia*, 672 F.2d 1349, 1368-1369 (11th Cir. 1982); *United States* v. *Contreras*, 667 F.2d 976, 978 n.2 (11th Cir.), cert. denied, 459 U.S. 849 (1982); *United States* v. *Davis*, 663 F.2d 824, 831 (9th Cir. 1981). In any event, the warrantless search of the airplane was supported by probable cause and amply justified by exigent circumstances. Thus, the admission of the evidence seized as a result of the search could not have constituted plain error.

On two previous occasions agents had observed petitioner depart for Panama with suspicious cargo that was later determined to be large amounts of currency for which none of the required disclosure forms had been filed. On the morning of May 4, 1983, the agents saw petitioner's airplane being loaded in precisely the same manner as on the two previous occasions. They learned from his flight plan that he would be traveling non-stop to Panama, and they ascertained that he had not filed a CMIR in connection with the flight. Once those events had occurred, the agents had probable cause to believe that a crime was being committed and that the cargo placed aboard the airplane would constitute evidence of the offense. The exigent circumstances justifying an immediate seizure were also clear: petitioner and his cargo were already aboard the aircraft, which was only moments away from departure on its flight to Panama.

Neither the language of the version of Section 5317 that was in effect at the time of the search of petitioner's airplane, nor the decision in *United States* v. *Chemaly, supra,* suggests that a warrantless search would be impermissible in these circumstances. In *Chemaly*, the court held that the predecessor of Section 5317 was designed to protect tourists and other travelers from "random, warrantless searches" (741 F.2d at 1350), and that the border search exception does not relieve the government of the

statutory warrant requirement (*id.* at 1351-1352). The court reasoned (*id.* at 1351 (footnote omitted)) that "[t]o hold that the general border search exception allows such searches for currency violations without probable cause and a warrant would remove that privacy protection at the place where Congress intended for it to attach." But *Chemaly* did not address the exception for searches in exigent circumstances, based on probable cause. An exception to the Section 5317(a) warrant requirement for such searches would not defeat any congressional intent to protect travelers from "random" warrantless searches. See *United States* v. *Rojas*, 671 F.2d 159, 166 (5th Cir. Unit B 1982) (in enacting Section 5317(a), "Congress did not intend to attach a warrant requirement to an otherwise lawful search"). Thus, even if the Eleventh Circuit's decision in *Chemaly* was correct, the admission of the seized evidence in this case was not an error, much less an error so "obvious" as to amount to plain error. See, *e.g.*, *United States* v. *Frady*, 456 U.S. 152, 163 (1982); *United States* v. *Granville*, 716 F.2d 819, 821 (11th Cir. 1983); *United States* v. *Blackwell*, 694 F.2d 1325, 1341 (D.C. Cir. 1982).

The question as to the validity of the airplane search under Section 5317 would not in any event warrant this Court's review in light of subsequent amendments of that provision. Less than a month after *Chemaly* was decided, Congress amended Section 5317 to permit warrantless searches at the border where there is reasonable cause to believe that a monetary instrument is being transported illegally. 31 U.S.C. (Supp. II) 5317(b). In 1986, Congress further amended Section 5317(b) to permit Customs officers to conduct warrantless searches for monetary instruments at the border without any cause whatsoever. Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, § 1355(a), 100 Stat. 3207-22 (to be codified at 31 U.S.C. 5317(b)). Accordingly, the issue of the applicability of 31

U.S.C. 5317(a) to searches such as the one in this case is of no continuing significance.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 1988

U.S. GOVERNMENT PRINTING OFFICE 1988—202-037/60449